

OPINION
59-222

December 16, 1959 (OPINION)

OFFICES AND OFFICERS

RE: Duties of Officers - Nepotism; Prevention of - Applicability
to Superintendents of State Institutions

This is in reply to your request for an opinion on the question whether or not superintendents of state institutions (State Training School) under your jurisdiction come under section 44-0409 of the N.D.R.C. of 1943.

You called to our attention that section 44-0408 specifically mentions state institutions and state boards, but section 44-0409, the one in question, merely mentions executive and administrative departments of the state. You also advise that the Board approves all appointments and salaries for all institutions under its jurisdiction.

The statute in question, section 44-0409, reads as follows:

NEPOTISM; PREVENTION OF. No head of any executive or administrative department, either elective or appointive, of this state, shall appoint his wife or her husband, as the case may be, son, daughter, brother, or sister, to any position under the control or direction of said head of such department."

To resolve the question at hand we must determine amongst other things what is meant by the term "head of any executive or administrative department." The term "head" is defined in the new Century Dictionary as one to whom others are subordinate, a leader or a chief (as the head of a state or church or a party); the chief or most important part; the position of leadership, chief command, or greatest importance. The term "head off" is used in many cases and often is used to designate a leader of a subgroup. For example, within a given organization or unit one can find similar designations as head of athletic department, head of dramatics, head of music, head of languages, etc. Also, depending on how many subdivisions a unit or organization might have one would find similar designations for each subdivision. We do not believe the term is used in that sense. To determine the true meaning of the term as used in the statute in question, we must consider the purpose of such legislation. This office in an opinion dated May 9, 1956, held that section 44-0409 did not apply to subordinate departments of the Public Welfare Board. The intent and purpose of the law was to prevent the alleged practice and custom of elective or appointive officers from appointing relatives to subordinate positions under their control. (170 Pac. 273) The term "head of any executive or administrative department" must refer to the person who has the authority and power to appoint a person to an office or position and to determine his salary.

Our next concern is whether or not the superintendent of the State Training School comes within the provisions of the statute. In other words, is he considered the head of an executive or administrative department? To resolve this question we will have to examine the entire setup of the State Training School. Under section 54-2301 of the 1957 Supplement to the N.D.R.C. of 1943 we find this provision:

The board of administration shall have full power to manage, control, and govern, subject only to the limitations contained in this chapter and in Title 25, the state hospital, the penitentiary, the blind asylum, the school for the deaf, the Grafton state school, the state training school, the state tuberculosis sanatorium, and such other charitable, reformatory, and penal institutions as have been or may be created or established according to law. The board shall not have the power to manage, control, and govern the soldiers' home. The term 'board' as used in this chapter shall mean the board of administration."

As is material to the question at hand, the above section has contained the same provision since 1925. Title 25 as mentioned in this section refers to "insane, feeble-minded, tubercular, blind, and deaf."

Under chapter 12-46 of the N.D.R.C. of 1943 relating to the State Training School we have section 12-4603 which provides:

The officers of the state training school shall be a superintendent and such teachers and assistants as may be deemed necessary and recommended by the superintendent and approved by the board of administration."

Section 12-4604 amongst other things provides:

APPOINTMENT AND REMOVAL OF OFFICERS; TERM OF OFFICE.
All other officers and employees shall be appointed by the superintendent, subject to the approval of the board and shall hold office at the pleasure of the superintendent. The superintendent shall show in the record of any officer or employee who is discharged by him the reason therefor."

In this same chapter, section 12-4606 provides:

SALARY OF SUPERINTENDENT, OFFICERS, AND EMPLOYEES. The superintendent and all other officers and employees shall receive a salary to be fixed by the board of administration within the limits of legislative appropriations therefor."

In considering the foregoing sections it is observed that the control, management and the governing authority is vested in the Board of Administration. It is also observed that the superintendent does not have final authority to appoint officers and employees of the training school. His power is limited. All of his actions in this respect must be approved by the Board of Administration.

From section 12-4604 it could be concluded that the only final

authority vested in the superintendent is to dismiss any officer or employee he so desires. This is based on the provision "shall hold office at the pleasure of the superintendent." Such final authority is not vested in the superintendent to appoint officers and employees.

When considering the purpose for the enactment of section 44-0409 we are certain that the reference to "the head of any executive or administrative" refers to the head of such department who has the full authority to appoint and discharge officers or employees and does not merely refer to a person who is held responsible for the technical and ministerial performance and operation of a "department." It is also observed that the statute apparently limits its application to executive or administrative departments. The term "executive or administrative department" does not appear to be an all inclusive term. Throughout the Code we find reference made to state institutions, departments, bureaus, commissions, judicial officers, etc. In this instance, however, we do not find such broad and sweeping language. It is observed that the same chapter in which the section in question is found other sections refer to duties of the person in charge of a state institution. But under the section in question we merely find the term "executive and administrative department."

In this connection it is observed that in section 32-0904 in speaking of matters of garnishment it refers to a public corporation, the state of North Dakota, or any institution, department, or agency of the state to include the various departments, etc., whereas in the section in question we merely find the term "executive and administrative."

A research on the topic matter does not reveal many cases on nepotism, and no North Dakota cases. There is, however, the case of Barton v. Alexander, 148 Pac. 471, which is somewhat similar to the question at hand. In the cited case the Soldiers' Home was governed by a board of control composed of the Governor, Secretary of State, and the Attorney General. The defendants, Robert Barton was the duly appointed, qualified, and acting commandant of the Soldiers' Home, and was the father of the matron of the home. The question was whether the appointment of the matron violated the nepotism law of Idaho. The nepotism law of Idaho was rather all inclusive, legislative, judicial, ministerial, or other officer of this state, or any district, county, city, or other municipal subdivision of the state, to appoint or vote for the appointment of any person related to him by affinity or consanguinity within the third degree,"

The Act also made it a misdemeanor for any of the above mentioned persons to vote for the appointment of any person related to him or any of his associates. The North Dakota Act does not contain the provision "related to him or to any of his associates." In this respect the Idaho statute was also broader and more comprehensive. The court in discussing this provision said:

(2, 3) An 'Associate in office' is one who shares the office or position of authority or responsibility, and not an appointee who does not share the responsibility or authority of the office. 'Associates in office' are those who are united in

action; who have a common purpose; who share responsibility or authority and among whom is reasonable equality; those who are authorized by law to perform duties jointly or as a body. Under the provisions of the law, the commandant is an appointee of said board and has entire control and management of the Soldiers' Home under such rules and regulations as may be prescribed by said board, and has no authority or equality with the members of the board in making such rules or regulations or in his own appointment or in the appointment of any other appointee that said board has authority to make. Clearly, he is not an 'associate in office,' as said phrase is used in said Act. There is therefore no good reason, so far as the record shows, why the plaintiff should not be retained in her present position as matron of the Soldiers' Home, and, if the board desires to retain her, it may do so and will not violate any of the provisions of said Act."

The similarity between the Board of Administration and the State Training School and the Board of Control and the Soldiers' Home is very apparent. In noting the all inclusive provisions of the cited case, and our somewhat restricted language in the North Dakota statute, the logical conclusion would be that the superintendent of the State Training School is not the head of such department. If the court was correct in determining in the cited case that the commandant was not an associate, it would follow that the superintendent would not be an associate. If he was not an associate in office, he certainly would not be the head of an executive or administrative department. The head of the institution is the Board of Administration. The superintendent has no equal voice or vote with the Board in appointing officers or persons to any position.

The history of the statute has some significance and importance in determining what was to be accomplished and what the legislative intent was in using the term "No head of any executive or administrative department." House Bill No. 17 of the 23rd legislative assembly was the "originator" of the Act involved. Such bill was originally introduced and contained the following language:

. . . . It shall be unlawful for any executive, legislative, ministerial or judicial officer to employ, appoint, or vote for the employment or appointment of any person related to him by affinity or consanguinity within the third degree, when the salary, wages, is to be paid out of the public funds or fees of such office."

The original bill in section 5 also defined what officers are affected.

Officers affected. Under the designation executive, legislative, ministerial or judicial officer as mentioned herein are included the Governor, Lieutenant Governor, Speaker of the House of Representatives, and members of the Legislative Assembly, all the heads of the departments of the state government, judges of all the courts of this State, all commissioners and boards and commissions of every nature of the state government, the industrial commission, the mill and elevator board, the Bank of North Dakota, the Board of

Administration in all of its several branches, the state university, the state agricultural college, the state normal schools, the state industrial school, the state training school, state soldiers' home, mayors, clerks, councilmen, trustees, and all other officials of the state, district, county, cities or other municipal subdivisions of the State, or any other office or department that may be created by law in the future."

The bill was introduced and referred to the ways and means committee. (House Bill No. 17, page 115, House Journal). The committee then made its report and recommended some minor amendments. (Page 284 House Journal). The bill was again rereferred to the committee on ways and means. (Page 286 House Journal). The ways and means committee reported the bill back and recommended that everything after the words "A Bill" be stricken and new language inserted which amounted to a complete new Act. The new Act then provided that it shall be unlawful for any state executive or ministerial officer to appoint or employ, etc. (House Journal Page 391). The house then went into a committee of the whole and recommended that everything after the words "A Bill" be stricken and that new language be inserted in lieu thereof. The new language amounted to a new Act again.

As is material here the new language provided "it shall be unlawful for the head of any department either elective or appointive, etc." The remaining portion being very much identical to the Act as it is found in the Code at the present time. This was adopted. (House Journal, page 441).

The bill was passed in this manner, (House Journal page 462), and sent to the Senate. The Senate amended the bill by inserting after the word "any" the words "executive or administrative." (Senate Journal page 954). It was passed in this manner and returned to the House which concurred in the amendment. This is the law as we have it today.

It is to be noted that the various changes throughout kept narrowing the application of the Act and then finally the Legislature deemed it advisable to change the wording from "The head of any department" to "The head of any executive or administrative department." By qualifying the term "department" it restricted its application. We must give recognition to the legislative action where the Legislature began first with a very broad, sweeping language, covering every type of department or conceivably office local or state government and subsequently kept modifying and amending such bill to the present language. It must be presumed that the Legislature intended to restrict the application only to such executive or administrative departments that exercise plenary control in appointing persons to positions.

The last qualifying phrase of section 44-0409, ". . . . shall appoint to any position under the control or direction of said head of such department" has significance. As pointed out before the full power to manage, control, and govern such institutions is vested with the Board of Administration under section 54-2301 of the 1957 Supplement. WE are also mindful that the statute in question is

within the general nature of a penal statute and as such is subject to strict construction.

In view of the foregoing, it is our conclusion that the superintendent of the State Training School and superintendents of other schools which are managed, controlled, and governed by the Board of Administration do not come within the provisions of section 44-0409.

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